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No. 85-1035

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

CROCKER NATIONAL BANK,
*Appellant,*

v.

PAUL PERDUE,
*Appellee.*

**On Appeal From the Supreme Court of California**

## MOTION TO DISMISS OR TO AFFIRM

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## QUESTIONS PRESENTED

1. Is the judgment of the California Supreme Court "final" within 28 U.S.C. § 1257, where California has not decided whether appellant's service charges violate state law, and where there is no important federal policy which would be seriously eroded by deferring review until that question has been decided?

2. Does the National Bank Act and related federal law preclude California from applying its unconscionability statute to national banks that impose unconscionable charges for overdrawn checks?

## TABLE OF CONTENTS

Page

JURISDICTION ..... 1

STATEMENT ..... 1

THE APPEAL SHOULD BE DISMISSED OR THE JUDGMENT AFFIRMED ..... 4

A. The Questions Presented Are Not Substantial ..... 5

1. *The National Bank Act* ..... 5

2. *The Comptroller's Interpretative Rule* ..... 12

3. *The 1980 and 1982 Statutes* ..... 13

B. This Court Has No Jurisdiction To Hear This Appeal ..... 15

CONCLUSION ..... 17

## TABLE OF AUTHORITIES

**Cases:** Page

*Anderson National Bank v. Luckett*,
321 U.S. 233 (1944) ..... 11, 12

*Capital Cities, Inc. v. Crisp*,
467 U.S. ____, 104 S.Ct. 2694 ..... 9, 10

*Cox Broadcasting Corp. v. Cohn*,
420 U.S. 469 (1975) ..... 15, 16

*Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) ..... 14

*Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141 (1982) ..... 6, 13

*First National Bank v. Kentucky*,
76 U.S. 353 (1870) ..... 3, 10

*First National Bank v. Missouri*,
263 U.S. 640 (1924) ..... 4, 7, 10-11

*Franklin National Bank v. New York*,
347 U.S. 373 (1954) ..... 8-9

*Jacklich v. Baer*,
57 Cal.App.2d 684, 135 P.2d 179 (3rd DCA 1943) ..... 16

*Jacobs v. Citibank*,
61 N.Y.2d 689, 462 N.E.2d 1182 (1984) ..... 9

*McClellan v. Chipman*,
164 U.S. 347 (1896) ..... 10

*Pacific Gas & Electric v. State Energy Resources Conservation & Development Comm.*,
461 U.S. 190 (1983) ..... 9

*Silkwood v. Kerr-McGee Corp.*,
464 U.S. 238 (1984) ..... 5, 9

Page

*Skidmore v. Swift & Co.*,
323 U.S. 134 (1944) ..... 13

*United States Trust Co. of New York v. New Jersey*,
431 U.S. 1 (1977) ..... 15

*United States v. Security Industrial Bank*,
459 U.S. 70 (1982) ..... 14

*Waite v. Dowley*,
94 U.S. 527 (1877) ..... 10

**Statutes and Regulations:**

Administrative Procedure Act,
5 U.S.C. § 553 ..... 3, 12

California Civil Code § 1670.5 ..... *passim*

California Financial Code

Sections 99-3707 ..... 11
Section 865.4(b)(1) ..... 11

Depository Institutions Deregulation and Monetary
Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 ..... 13

Garn-St. Germain Depository Institutions Act of 1982,
Pub. L. No. 97-320, 96 Stat. 1469 ..... 13

12 C.F.R.

Section 7. 6025(a) (1985) ..... 7
Section 7.800 (1985) ..... 12

Page

12 U.S.C.

Section 24 ..... 5, 11
Section 36 ..... 6
Section 85 ..... 6
Section 484 ..... 5, 7
Section 1735f-7 ..... 14
Section 1832(a) ..... 14
Section 1842(d) ..... 6
Section 3503 ..... 14

28 U.S.C. § 1257 ..... 1, 15

**Other Authorities:**

Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 Stan. L. Rev. 1 (1977) ..... 11

Senate Report No. 96-368, 96th Cong. 2nd Sess. (1979) ..... 13, 14

48 Fed. Reg. 54319 (1983) ..... 13

49 Fed. Reg. 28237 (1984) ..... 13

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## MOTION TO DISMISS OR TO AFFIRM

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### JURISDICTION

Appellant seeks review under 28 U.S.C. §§ 1257(2) and 1257(3). However, as explained more fully at pages 15-17, *infra*, the California Supreme Court has not issued a "final judgment" within 28 U.S.C. § 1257, and this case does not fall within one of the recognized exceptions to the final judgment rule. Therefore, this Court should dismiss the appeal.

### STATEMENT

In 1976, appellee Paul Perdue opened a checking account at the appellant Crocker National Bank ("Crocker").[1] At that time, Perdue executed a bank signature card that re-

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[1] "App.__" refers to one of the appendices to the Jurisdictional Statement; "Add.__" refers to the addendum to this brief; "JS__" refers to Crocker's Jurisdictional Statement; "Opinion" refers to the opinion of the California Supreme Court.

quired him to pay whatever service charges Crocker chose to impose (Opinion, App. A at 13a). Subsequently, one of his checks was returned for insufficient funds (an "NSF" check), and Crocker imposed a $6 service charge. Thereafter, on July 3, 1978, Perdue filed a class action lawsuit against appellant seeking damages for himself and other Crocker customers who were similarly injured. His complaint alleged that if the signature card is a contract, it is a contract of adhesion, and that Crocker's fee for NSF checks is unconscionable (App. D at 58a-60a). The critical factual allegation was that NSF checks cost defendant $.30, whereas Crocker charged customers $6, or 20 times the actual cost (App. D at 57a).

The trial court dismissed the complaint for failure to state a claim upon which relief may be granted (App. B at 38a), and the California court of appeals affirmed (App. C at 40a). Neither court relied on the National Bank Act, 12 U.S.C. §§ 1, *et seq.*, and the preemption issue, which is the basis for this appeal, was not raised until the Comptroller of the Currency (the "Comptroller") filed an *amicus curiae* brief shortly before oral argument in the court of appeals.

The California Supreme Court reversed, holding that the trial court had erred on the question of whether plaintiff had stated a cause of action for unconscionability (App. A at 37a). Relying on California Civil Code § 1670.5 (App. K at 103a), which is applicable to all businesses in the State, the Court held that appellee is entitled to a hearing on whether the NSF charge of $6 imposed by Crocker is unconscionable (App. A at 14a). In support of this conclusion, the Court pointed out that the "contractual language appears in print so small that many could not read it," and that the signature card does not identify the amount of the charges for NSF checks or even the fact that the consumer is agreeing to pay for them (*id.* at 3a, 13a). Instead, it simply states that the depositors "agree with Crocker National Bank [that] this account and all deposits therein shall be . . . subject to all ap-

plicable laws, to the Bank's present and future rules, regulations, practices and charges" (*id.* at 2a).[2]

Furthermore, the bank does not provide depositors with a schedule of its charges, and it retains the power to change its fees at any time, although pursuant to California law it must give customers notice of such changes (*id.* at 3a). "In short," according to the Court, "the bank structured a totally one-sided transaction" (*id.* at 14a). Given the "absence of equality of bargaining power," the Court held that "plaintiff's charge that the bank's NSF fee is exorbitant. . . cannot be dismissed on demurrer" (*id.* at 14a).

The Court then considered the question of whether the National Bank Act or any other federal banking legislation preempts the state statute prohibiting unconscionable contracts. In evaluating this question, it considered a regulation adopted by the Comptroller just two business days before oral argument, which the Comptroller conceded was merely interpretative because it had not been adopted in compliance with the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553. After reviewing the statutes, regulations, and case law, the Court rejected the Comptroller's interpretation and held that Congress had not preempted this state law. In support of this conclusion, it pointed out that there is no language in the applicable statutes indicating an intent to preempt state law and that this Court has recognized in a long line of cases that "national banks have traditionally been 'governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws.' " *Id.* at 27a, *quoting First National Bank v. Kentucky*, 76 U.S. 353, 362 (1870). Accordingly, the California Supreme Court reversed the judgment below and remanded the case to the trial court for resolution of the request for class certification and the merits (*id.* at 37a).

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[2] The full contractual provision which appears on the signature card is set out in its actual type-size below:

> We agree with Crocker National Bank and each other that
> This account and all deposits therein shall be of the kind and nature indicated above, and subject to all applicable laws, to the Bank's present and future rules, regulations, practices, and charges, and to its right of setoff for the obligations of any of us.

Complaint, Exhibit 2 (re-typeset for clarity).

## THE APPEAL SHOULD BE DISMISSED OR THE JUDGMENT AFFIRMED.

On several occasions, this Court has held that the states have the authority to regulate national banks unless there is a direct conflict between state and federal law. *See First National Bank v. Missouri,* 263 U.S. 640 (1924) and cases cited at pp. 10-11, *infra.* As demonstrated in section A below, the California Supreme Court correctly interpreted these cases and this Court's recent decisions concerning the federal preemption doctrine. Thus, federal banking statutes have not preempted California's prohibition on unconscionable contracts because there is no conflict between state and federal law and because Congress has not occupied the field of banking. Indeed, the Comptroller himself has periodically issued opinions which conclude that states have the power to regulate service charges imposed by national banks, and thus the California Supreme Court correctly rejected the Comptroller's contrary 1983 interpretative ruling.

Although jurisdictional questions are ordinarily discussed before the merits, here the jurisdictional issue is intertwined with the merits because it involves principally an issue of timing and depends in part on the nature of appellee's claim and Crocker's defenses. Therefore, we discuss the jurisdictional issue in section B, where we demonstrate that even if this case raised substantial questions of federal preemption, it will not be suitable for review until the California courts have decided whether the particular service charges at issue are unconscionable. Only then will it be possible to determine the extent to which California's contract law interferes with national banking policy, which is the critical issue that the Court would have to decide if it granted plenary review at this time. Since the decision below does not fall within any of the recognized exceptions to the final judgment rule, the appeal should be dismissed for want of jurisdiction.

**A. The Questions Presented Are Not Substantial.**

This Court held in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), that Congress may preempt state laws in one of two ways. First, a state law is preempted "to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law" or "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." 464 U.S. at 248. Second, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." *Id.* While it is not clear from Crocker's Jurisdictional Statement on which of these doctrines its argument depends, an examination of the relevant federal banking laws and regulations demonstrates that Congress has not preempted state laws pertaining to bank service charges under either approach.

**1. The National Bank Act.**

a. The authority on which Crocker principally relies is the National Bank Act of 1864. However, that statute does not mention bank service charges, but instead authorizes the Comptroller to charter national banks and defines the powers of those banks. Nevertheless, Crocker contends that two provisions support its preemption argument: the general powers conferred by section 24 and the limitation on visitorial powers in section 484. 12 U.S.C. §§ 24, 484.

There is no conflict between the seventh power in section 24 and state law since the bank can easily comply with both California law and the National Bank Act. California Civil Code 1670.5 provides that a court may "limit the application of any unconscionable clause [in a contract] as to avoid any unconscionable result" as well as impose various other remedies which are traditional for breach of contract claims. No provision of federal law requires that banks impose unconscionable fees, and in fact, the seventh power, cited by Crocker (JS 8), simply provides that national banks shall have "all such incidental powers as may be necessary to carry on the business of banking." 12 U.S.C. § 24. Thus, on its face, this provision of the

National Bank Act does not conflict with California Civil Code § 1670.5.

Section 24 of the National Bank Act contrasts sharply with the three examples of provisions that preempt state law which are cited in the *amicus curiae* brief of the California Bankers Clearing House Association ("California Bankers"): 12 U.S.C. § 36 (regulating the use of branch banks); § 85 (regulating interest charges); and § 1842(d) (regulating the acquisition of bank holding companies). In each instance, Congress explicitly regulated an area of banking and preempted state law, although it also provided that states may regulate to a limited degree. Since Congress preempted the states in these three areas, the fact that it explicitly left the states some authority to regulate does not demonstrate, as the California Bankers argue (Br. 6-9, 12), that Congress's failure to authorize state regulation of service charges indicates an intent to preempt this area as well. To the contrary, the existence of these specific preemption provisions and the absence of a comparable provision applicable to service charges demonstrate that Congress intended that state contract law apply to bank service charges.[3]

Nor has Crocker or the *amici curiae* identified a fundamental purpose or objective in the National Bank Act which would be frustrated by the application of California's unconscionability law to national banks. California has not impaired the ability of national banks to operate within the State or discriminated against national banks in any way. It has merely prohibited all businesses, including national banks, from treating customers in

[3] The California Bankers' reliance on *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 163 (1982) (Br. 8) is also misplaced. The question in *De la Cuesta* was whether the failure of Congress to preempt the states from regulating the terms of home mortgage loans issued by national banks had the effect of prohibiting the Federal Home Loan Bank Board from issuing a regulation, after providing notice and an opportunity to comment, which preempted contrary state laws. Since the Comptroller has not issued a substantive regulation preempting the states in the area of service charges, *see* pp. 12-13, *infra*, the *De la Cuesta* case simply has no application to the issues raised here. If anything, the case is supportive of appellee since the Court appeared to assume that state law would have applied if the Federal Home Loan Bank Board had not issued its own substantive regulation.

a grossly unfair manner. Since national banks are otherwise free to conduct their business, there is no conflict between the state law and the purposes of the National Bank Act.

There is also no inconsistency between section 484 of the National Bank Act and California law. That section states that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, [or] vested in the courts of justice. . . ." 12 U.S.C. § 484. Although the Comptroller did not rely on section 484 in either of the briefs he filed in the California Supreme Court or in the preamble to his interpretative regulation (App. L at 104a-27a), Crocker argues that the states have no authority to prohibit unconscionable contracts because section 484 gives only the Comptroller access to the records of a national bank. *See* JS 14. This contention is similar to an argument advanced in *First National Bank v. Missouri, supra,* where this Court held that states may prohibit national banks from establishing branch offices. There, the Court found that "the United States alone may inquire by quo warranto whether a national bank is acting in excess of its charter powers, and that the state is wholly without authority to do so," but it nevertheless concluded that the National Bank Act was no bar to the enforcement of state law. 263 U.S. at 660. Similarly here, any prohibition in section 484 of the Act is no bar to the enforcement of California's unconscionability statute.

The California Supreme Court suggested that section 484 may limit the appellee's discovery and thus may make it more difficult for Perdue to prove his case at trial (App. A at 21a n.21). However, this possibility does not amount to a conflict between the federal and state statutes since Crocker can easily comply with section 484 and California Code § 1670.5, and since the purpose served by section 484 is not frustrated by the State's unconscionability law.[4]

[4] There is also a serious question as to the correctness of Crocker's claim that appellee may not use the judicial process to determine the basis for Crocker's NSF charges. Section 484 authorizes the Comptroller to create exceptions to the prohibition on examining bank records, which he has done by specifically providing that "[p]roduction of records may, however, be required under normal judicial procedures." 12 C.F.R. § 7.6025(a) (1985). This regulation is consistent with 12 U.S.C. § 484, which also creates an exception for "courts of justice."

Nor is there any conflict between the Comptroller's *Handbook*, which mentions that NSF charges should be sufficiently high to deter NSF checks (App. J at 91a), and the California unconscionability law. First, the Comptroller's *Handbook* is not a duly promulgated regulation and therefore is relevant only to the extent that it correctly interprets the National Bank Act. Second, the unconscionability doctrine prohibits only unreasonable charges, and Crocker will have the opportunity to prove at trial that its charges serve a legitimate business purpose and that its fees have been endorsed by the Comptroller. Even if the California court were to conclude that its fees are unconscionable, Crocker has not demonstrated, and presumably could not demonstrate, that it would be deprived of the ability to charge fees sufficiently high to deter NSF checks.

The only case which Crocker has identified where this Court has held that there is a conflict between federal banking law and state law is *Franklin National Bank v. New York*, 347 U.S. 373 (1954). There, this Court reviewed a New York law that permitted state-chartered savings banks to advertise that they accepted savings accounts, but prohibited all other banks, including national banks, from using the words "saving" or "savings" in their advertising or business. This Court held that the New York law conflicted directly with the National Bank Act and the Federal Reserve Act, which both specifically authorized national banks to receive savings deposits. 347 U.S. at 377-78. Relying on "the fact that Congress has given a particular label to this type of account," the Court reasoned that "[i]t would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it." *Id.* Moreover, that statute discriminated against national banks since it permitted state but not federal banks to advertise that they would accept savings deposits. Here, none of these factors exist: there is no provision in federal law covering such service charges; a prohibition on exorbitant service charges will not interfere with Crocker's ability to conduct the business of banking; and the California statute applies equally to state and national banks, as

well as to all other California businesses. Thus, *Frankin National Bank* does not support the Comptroller's argument that the National Bank Act is inconsistent with California's unconscionability law.[5]

b. It is equally clear that Congress did not intend to occupy the entire field – that is, to preempt all state laws applicable to national banks. Although there have been numerous cases litigated under the National Bank Act during the past 120 years, insofar as we are aware, no court has ever held that the Act entirely preempts the states from regulating national banks.

In recent years, this Court has considered this general issue on several other occasions, and it has uniformly required an affirmative showing that Congress or the administrative agency intended to preempt the entire field before it has concluded that state law has been rendered inoperative. For example, in *Pacific Gas & Electric v. State Energy Resources Conservation & Development Comm.*, 461 U.S. 190 (1983), the Court held that states may prohibit the construction of nuclear reactors for reasons not related to safety, even though Congress and the Nuclear Regulatory Commission had preempted the entire field of nuclear safety through the comprehensive and detailed regulation of commercial nuclear power plants. Similarly, in *Silkwood v. Kerr-McGee Corp., supra*, victims of radiation injury were allowed to recover punitive damages from nuclear power companies, even though one of the purposes of punitive damages is to deter the unsafe operation of nuclear power plants. The decision in *Capital Cities, Inc. v. Crisp*, 467 U.S.

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[5] Crocker also asserts that *Jacobs v. Citibank*, 61 N.Y.2d 689, 462 N.E.2d 1182 (1984), supports its preemption argument. However, the principal basis for the decision in *Jacobs*, which was decided without a trial, was that the service charges at issue there were not unconscionable under New York law. 462 N.E.2d at 1184. While the Court noted that the task of limiting service charges imposed by national banks "is a task more properly left to the Comptroller of the [C]urrency," 462 N.E.2d at 1183, the opinion contains no discussion of federal preemption. Thus, Crocker's statement that "the decision below squarely conflicts with the decision in [*Jacobs*]" (JS 23) is incorrect.

____, 104 S.Ct. 2694 (1984), is also consistent with these precedents. There, this Court ruled that the Federal Communication Commission's intent to preclude state regulation of cable television advertising, unambiguously expressed in regulations over a 20-year period, preempted a state law prohibiting advertising of alcoholic beverages, especially where the Oklahoma law "forces [cable] operators to lose the protections of compulsory licensing." 104 S.Ct. at 2707.

Here, in contrast, this Court has explicitly recognized on several occasions that national banks are regulated by both federal and state laws. As it held shortly after the National Bank Act was enacted,

> [w]e have more than once held in this Court that the national banks organized under the Acts of Congress are subject to state legislation, except where such legislation is in conflict with some Act of Congress, or where it tends to impair or destroy the utility of such banks, as agents or instruments of the United States, or interfere with the purposes of their creation.

*Waite v. Dowley*, 94 U.S. 527, 533 (1877). The Court had articulated this principle in *First National Bank v. Kentucky*, 76 U.S. 353, 362 (1870), ruling that states may tax stock in national banks, and cautioning that national banks "*are governed in their daily course of business far more by the laws of the State than of the Nation*" (emphasis supplied). It applied this principle again in *McClellan v. Chipman*, 164 U.S. 347 (1896), where it upheld a state law which had the effect of denying a national bank collateral on a loan.

The principles announced in these cases were followed in *First National Bank v. Missouri, supra,* in which the Court rejected a claim that a state law prohibiting banks from establishing branches was preempted by the incidental power provision in the National Bank Act relied on by Crocker here. 263 U.S. at 659. Although the authority to establish branch banks is far closer to the core of bank functions than is control over bank service charges, this Court emphasized that "national banks are [in general] subject to the laws of a state in respect to

their affairs." *Id.* at 656. The only limitation is that state laws must not "interfere with the purposes of their creation, tend to impair or destroy their efficiency as Federal agencies, or conflict with the paramount law of the United States" (*id.*), which, as shown above, is not the case here.

The Court followed these cases again in *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944), where a national bank challenged a state law which required it to turn abandoned deposits over to the state. Although the National Bank Act specifically authorizes national banks to "receiv[e] deposits," 12 U.S.C. § 24, and although the Comptroller argued that state law was preempted, this Court upheld the state law. Again the Court emphasized that "national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions." 321 U.S. at 248.

The consistent theme which runs through all these cases is that the National Bank Act contemplates that the states are to have an important role in regulating the activities of national banks. All their contracts are governed by state law, as are numerous other aspects of their business. *See* Opinion at App. A, 29a n.33; *see also* California Financial Code §§ 99-3707. In fact, in its Jurisdictional Statement, Crocker acknowledges that California Financial Code § 865.4(b)(1) requires it to give customers 15 days notice of any change in its service charges (JS 5 n.4). Since Crocker apparently does not contend that this law is preempted, it implicitly agrees that the State may, to some extent, regulate the service charges imposed by national banks. *See also* Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 Stan. L. Rev. 1 (1977).

When these principles are applied to the instant case, it becomes evident that there is no substantial question as to whether the National Bank Act preempts California's law providing a remedy against unconscionable contracts. California Civil Code § 1670.5 does not interfere with Crocker's ability to carry out its function as a bank, nor does it conflict with a federal law. It applies equally to all businesses, including all

banks located in the State. Like the provision requiring notice of increases in service charges, section 1670.5 is intended to give customers a small amount of protection, while giving businesses, including banks, broad latitude to set prices and to conduct their affairs, as long as they do not act in an unconscionable manner.

**2. The Comptroller's Interpretative Rule.**

In 1977, the Comptroller issued an opinion letter which considered whether the National Bank Act or the Comptroller's regulations preempt state laws regulating bank service charges (Add. 1a-3a). Relying on *Anderson National Bank v. Luckett, supra*, and several other authorities, the Comptroller concluded that "[s]tate-imposed limitations on certain service charges would not seem to be subject to federal preemption under the criteria established in the case law." The letter also specified that service charges "should be arrived at by each bank on a competitive basis" and not jointly by the banks, and that "[a] state law or regulation which established a maximum amount for any particular type of service charge would . . .not be in conflict with the Comptroller's ruling." *Id.* The Comptroller reaffirmed his opinion in 1979 (Add 4a). *See also* Add. 5a.

Crocker relies on the recent contrary interpretative ruling, adopted by the Comptroller immediately before oral argument in the California Supreme Court, without notice and an opportunity for comment from the public. 12 C.F.R. § 7.800 (1985). Either the regulation was adopted to assist Crocker in this lawsuit, or there is a remarkable coincidence between its timing and this case. In either event, that regulation is not a substantive rule because it was not adopted in compliance with the requirements of the Administrative Procedure Act, 5 U.S.C. § 553. When appellee pointed this out to the California Supreme Court, the Comptroller agreed (App. L at 114a), and he subsequently amended the notice of the regulation to make it clear that the rule only provides the Comptroller's interpretation of

federal banking law. *Compare* 48 Fed. Reg. 54319 (1983) *with* 49 Fed. Reg. 28237 (1984) (App. I at 76a-86a).[6]

The Comptroller's interpretative rule, however, is entitled to little, if any, weight in deciding the statutory preemption issue here. As this Court emphasized in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the value of an interpretative regulation in a particular case "will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Here the Comptroller's notice of the new interpretation contains little discussion of the preemption question, and the rule itself is inconsistent with prior pronouncements. Moreover, its timing suggests that it was issued solely to influence the outcome of this case. Thus, applying the teachings of *Skidmore*, the California Supreme Court correctly concluded that the interpretative rule is in fact an attempt to legislate and held that "legislation cannot be enacted in the guise of statutory interpretation" (App. A at 33a).

**3. The 1980 and 1982 Statutes.**

The banking legislation adopted by Congress in 1980 and 1982 also does not bar appellee's claims.[7] Like the National Bank Act, neither statute refers to bank service charges. Moreover, the legislative history of the 1980 legislation demonstrates that Congress intended that all state laws pertaining to banking continue to apply to national banks, unless specifically preempted.

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[6] Thus, this case does not present the issue of whether the Comptroller would have the power to issue such a rule in compliance with the Administrative Procedure Act. In contrast to the authority given the Federal Home Loan Bank Board, *see Fidelity Federal Savings & Loan Association v. De la Cuesta*, *supra* (*see also* p. 6 n.3, *supra*), the Comptroller's rulemaking authority here is limited to regulating "unsafe and unsound banking practices." Senate Rep. No 96-368, 96th Cong., 2nd Sess. 13 (1979).

[7] *See* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469; The Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132.

Thus, the 1980 Act phased out regulation of interest rates paid by national and certain other banks, authorized federal institutions to offer interest-bearing checking accounts, and preempted state ceilings on mortgage interest. 12 U.S.C. §§ 3503, 1832(a), 1735f-7. Regardless of whether appellant is correct in its claim that Congress recognized that banks which paid consumers higher interest rates were likely to increase their service charges (JS 20), Crocker has been unable to identify any provision in the statute or any statement in its legislative history that even suggests that Congress intended to preempt all state laws applicable to bank service charges.

The issue of preemption was in fact discussed in the Senate Report in connection with the provisions preempting state usury limitations on mortgages. The Report explicitly states that the law was not intended to nullify state limitations on other payments associated with mortgage loans, such as pre-payment charges and attorney fees. Senate Report No. 96-368, 96th Cong. 2nd Sess. 19 (1979). The fact that Congress carefully limited the preemptive effect of even this law demonstrates that it could not have intended to preempt all state regulation of bank charges, as Crocker argues.

Even if the 1980 and 1982 bank deregulation acts had preempted state laws regarding bank service charges, those statutes would have no application here because appellee filed his complaint in July 1978. "The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other." *United States v. Security Industrial Bank*, 459 U.S. 70, 79-80 (1982). Since there is not even a suggestion that Congress intended that the recent banking statutes be applied retroactively to cut off appellee's claim for damages, even if Crocker were correct about their impact on state laws regulating bank service charges, they have no application to this case. Moreover, construing the deregulation statutes retroactively to cut off these claims would raise serious constitutional issues. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) (leaving open the question as to whether the due process clause

rohibits the elimination of state law claims without a easonable substitute); *cf. United States Trust Co. of New York. v. Jew Jersey,* 431 U.S. 1 (1977) (determination of whether state aw impairing contracts violated contract clause in U.S. Constitution turns on overall reasonableness of state's actions). For hese reasons as well, the 1980 and 1982 bank deregulation acts lo not preempt the state law applicable here.

* * * * *

Two other points are worth noting. First, although the decision below could apply to other bank service charges, there has been no claim that Crocker's other service charges are also unconscionable. Crocker will have the opportunity to argue to the trial court that the reasonableness of its other fees is relevant to the issue of whether its NSF charges are unconscionable. Second, the result that Crocker is advocating is one of no regulation since the Comptroller has not placed any limitation on service charges imposed by national banks. Thus, if California contract law does not apply, then Crocker and other banks could charge their customers any amount, even $100, for NSF checks. The fact that the Comptroller has chosen not to place any limit on these charges makes it even more important that the state unconscionability laws continue to apply to national banks.

**B. This Court Has No Jurisdiction To Hear This Appeal.**

Even if the Jurisdictional Statement raised a substantial federal question, the appeal should nevertheless be dismissed. Section 1257 of title 28 limits this Court's review of state court decisions to "final judgments." This Court has, with four exceptions, interpreted the final judgment rule to require that there be nothing further to be determined by the state court. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). Here, the state courts have not yet determined whether appellant's NSF charges are unconscionable under California law.

Crocker relies on the exception for cases in which the federal issue has been finally decided in the state courts, where the party seeking review might prevail on the merits in state court, and

where reversal on the federal issue would terminate any further litigation (JS 24 n.20). *See* 420 U.S. at 482-83. Even in such cases, the Court has required a demonstration that "refusal immediately to review the state court decision might seriously erode federal policy." *Id.* Crocker argues that refusal to grant review would seriously erode the congressional policy of "requiring federally insured financial institutions to set the amount of those charges at market levels, and would undermine the clear mandate of the 1980 and 1982 deregulation acts and the Comptroller's interpretive regulation" (JS 24 n.20).

The problem with this argument is that Crocker has not identified any statement of that policy in any federal statute. It has simply restated the federal interests which it infers from the statute and on which it relies for its preemption claims. But if a federal interest of this kind were sufficient to qualify for this exception to the final judgment rule, then the requirement that the state court decision "might seriously erode federal policy" would be meaningless, since whenever a federal statute is at issue, it will always be possible to identify some arguable federal interest that could be eroded. While not dispositive, the fact that the Comptroller of the Currency, who participated below, has not urged this Court to hear Crocker's appeal undercuts Crocker's claim that an important federal interest is at stake.

There is another reason why there is no final judgment on the preemption claim. Courts have been reluctant to hold contracts unconscionable. According to appellee's research, the last time the California courts held a price term in a contract unconscionable was in 1943. *Jacklich v. Baer,* 57 Cal. App. 2d 684, 135 P.2d 179 (3rd DCA). Thus, it is far from certain that appellee will prevail on the merits, which further undermines Crocker's argument that the decision below presently interferes with federal banking policy.

Crocker also argues that the interference with federal banking policy is established because the decision below will "impair[ ] the pricing and marketing flexibility needed to attract deposits." It bases this assertion on the claim that its charges are within the range of the NSF fees charges by other banks, that it is unfair to

isolate a single fee, and that its fees may reflect charges necessary to deter NSF checks (JS 11). However, the California courts have not yet determined whether these arguments are valid defenses to an unconscionability claim, and, until those issues are decided, it will be impossible to assess the impact of California's unconscionability law on the operations of national banks. Thus, if Crocker is correct that the impact of California Code § 1670.5 on its operations is relevant to the preemption question, this suggests that the Court should wait until this case has been fully adjudicated before deciding whether a substantial federal question has been raised.

## CONCLUSION

For the foregoing reasons, the appeal should be dismissed, or, alternatively, the decision below should be summarily affirmed.

Respectfully submitted,

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January 1986

# ADDENDUM

[Letter from Legal Advisory Services Division, Comptroller of the Currency, submitted to California Supreme Court by letter of July 30, 1984]

Aug 22, 1977

Dear Mr. _____

This refers to our recent telephone conversation in which you questioned whether the New York Banking Board's regulation which prescribes the maximum service charge that a bank may impose on a check returned for insufficient funds validly applies to national banks.

The Comptroller's Interpretive Ruling 7.8000 on service charges states simply that [a]ll charges to customers should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding or even discussion among banks or their officers." The thrust of the interpretation is that service charges must be determined competitively by each bank and not pursuant to any understanding or arrangement with other financial institutions.

A state law or regulation which established a maximum amount for any particular type of service charge would therefore not be in conflict with the Comptroller's ruling. A long line of cases holds that state statutes and regulations issued thereunder validly apply to national banks unless they interfere with the purposes of the national bank's creation, tend to impair or destroy their efficiency as federal agencies or conflict with paramount law of the United States. *See, e.g., Anderson Nat. Bank v. Luckett,* 321 U.S. 233 (1944); *Bank of America, National Trust & Savings Ass'n v. Lima*, 103 F.Supp. 916 (D. Mass. 1952); *Richie on Banks and Banking*, Vol. 7B 5 and cases cited therein (1973). State-imposed limitations on certain service charges would not seem to be subject to federal preemption under the criteria

established in the case law. Such a conclusion is consistent with the long recognized fact that

> National banks are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. *(McClellan v. Chipman*, 164 U.S. 347 (1896)).

Pursuant to the authority granted by Section 108(9) of New York's Banking Law (4 McKinney 108(9)), the New York Banking Board has issued the following regulation:

> The maximum charge which may be imposed by a bank, trust company, savings bank or savings and loan association in connection with a check or other written order drawn upon it on insufficient funds or on uncollected balances. . . is four dollars. . . (General Regs. Banking Bd. Ch. 1 Part 32.1 (1975)).

It is important to note that the regulation applies only to a bank, trust company, savings bank or savings and loan association. Bank is defined in Section 2(1) of the New York Banking Law. (4 McKinney § 2(1)):

> The term, "bank," when used in this chapter, unless a different meaning appears from the context, means any corporation, other than a trust company, organized under or subject to the provisions of article three of this chapter.

The construction of this section by the State Attorney General and one court case offer no additional guidance useful for our purposes concerning the definition of the term "bank." *See, In re Bush's Estate*, 39 N.Y.S. 2d 633 (1943) (a building and loan association is not a bank within a meaning of subdivision 1 of

this section); 1935, Op. Atty. Gen. 404 (the receipt of deposits of money is of the essence of banking and the term "bank" as defined in this section definitely encompasses the scope of any money corporation authorized to receive deposits of money). Clearly a national bank is not "organized under" Article III of the Banking Law. Nor would it seem generally to be "subject to" the provisions of this article which essentially outlines the powers and duties of banks and trust companies and establishes a thorough regulatory and supervisory scheme. See, 4 McKinney § 94 *et seq.* The National banking system is of course separate from this scheme and is set forth in Title 12 of the United States Code. Furthermore, in the few sections of Article III which relate specifically to national banks, such as conversions or mergers between national banks and state banks, the term "national banking association" is used. See, 4 McKinney §§ 136 and 137.

It is, therefore, my opinion that the term "bank" applies only to state banks and that the New York Banking Board's regulation or maximum service charges on returned checks does not apply to national banks. If the state legislature had intended otherwise, it presumably would have included "national banking associations" within the granting authority contained in Section 108(9) of the Banking Law. The earlier interim letter written from this Office to Mr._____ who had inquired about a five dollar service charge imposed by an unnamed national bank, should accordingly be considered withdrawn. A follow-up letter to this effect will be sent to Mr._____.

Very truly yours,

William B. Glidden
Staff Attorney
Legal Advisory Services Division

[Letter from Comptroller of the Currency, submitted to California Supreme Court by letter of July 30, 1984]

Comptroller of the Currency
Administrator of National Banks
Washington, D.C. 20219

December 4, 1979

Dear Mr. Chairman:

This is in response to your letter of October 24, 1979, in which you ask this Office to comment on the legal issues involved in the imposition of bank service charges on dormant deposit accounts and other unclaimed property which is held by the bank. A bank's authority to impose service charges on dormant accounts is based entirely upon state contract law. In states which permit such charges, national banks may assess them; however, if state law restricts such charges, national banks must comply with those restrictions.

The requirement that national banks must conform their conduct to pertinent state contract law is embodied in Comptroller's Interpretive Ruling 7.7515 which provides that: "A national bank may, *consistent with contracts of deposit*, impose such service charges on dormant accounts as its board of directors determines to be reasonable." 12 C.F.R. § 7.7515 (emphasis added). While the underlying premise of this ruling is that a valid contract must exist for service charges to be deducted or interest payments stopped, it is the clear intent that state law govern all issues of contract formation, contract interpretation, and contract enforcement. Thus, your specifically enumerated questions, regarding the type of instruments upon which service charges may be imposed, the sort of notice necessary to create contracts which permit service charges, the necessity of disclosing the amount of the charge, and the reasonableness of that amount cannot be answered without specific reference to the law of the state in which the national bank is located.

Because the laws of each state may differ, and the state courts are better able to interpret and apply the pertinent law to contract disputes, it would, in our opinion, be inappropriate for this Office to arbitrarily establish a national standard regarding the permissibility and amount of such charges. Moreover, inasmuch as many of your specific questions are at issue in complex pending litigation, it would be highly inappropriate for the Comptroller to express an opinion on them. *See Bank of America v. Cory*, Civ. No. 257509 (Sacramento Super. Ct., filed *October 20, 1975)* (scheduled for assignment on December 3, 1979).

Most importantly, it should be recognized that state law, and not federal regulation, governs this issue. The Comptroller's Interpretive Ruling does not purport to preempt state contract law.

Sincerely,

John G. Heimann
Comptroller of the Currency

The Honorable
Benjamin S. Rosenthal, Chairman
Subcommittee on Commerce, Consumer,
and Monetary Affairs
Washington, D.C. 20515

[Letter from Special Assistant to Comptroller of the Currency, submitted to California Supreme Court by letter of July 30, 1984]

Nov. 29, 1967

Dear Senator Spong:

This refers to your undated communication requesting a report from this Office concerning a letter you attached from a constituent, Mr. Steve Wise, of Newport News who is concerned with 1) banks which consider accounts overdrawn when the bank's service charges cause the insufficiency and 2) banks which return checks for insufficient funds when such funds are deposited after the checks are written.

In regard to the first issue, that of service charges, it has been the consistent policy of this Office that a national bank may impose reasonable service charges for the handling of accounts and related matters. Banks customarily have an understanding with each depositor that service charges and related charges, such as those for personalized checks, will be charged directly against his account, rather than billed to him for later payment. This practice has evolved throughout years of banking operations and varies from community to community, with nearly universal satisfaction. One of the merits of a bank-depositor relationship is that it is almost entirely subject to contractual agreement, leaving customers free to deal with banks according to their individual requirements, and allowing the banks to serve their customers in an ever-increasing variety of ways.

The second matter brought up by Mr. Wise, the instance of a bank refusing to honor a check with funds that were not deposited until after the check was written, is governed by the Uniform Commercial Code effective in Virginia since January 1, 1966. Although the Code permits banks to charge a customer's account even though the charge creates an overdraft,

the language does not appear to require such action. Statutory interpretation is, of course, a matter for the courts. May we point out that all legal actions arising under the Code are private legal disputes under state jurisdiction and do not involve this Office.

If we can be of further assistance, please do not hesitate to call upon us.

Very truly yours,

R.R. Cox
Special Assistant to the
Comptroller of the Currency

Honorable William B. Spong, Jr.
U.S. Senator
Washington, D.C.

WALSH:ref 11/29/67